A

Restoran Rizqin v Asia Commercial Finance (M) Bhd

HIGH COURT (SHAH ALAM) — APPEAL NO MT3–12–117 OF 2002
ZALEHA ZAHARI J
4 FEBRUARY 2005

B

Partnership — Suits by and against partnerships — Breach of contract with partnership — Suit against partnership a suit against all partners — Partnership Act 1961 ss 7, 8, 11

Partnership — Liability of partners — Debt — Contract not signed by one of the partners —
C *Whether that partner jointly and severally liable — Partnership Act 1961 ss 7, 8, 11*

The plaintiff had entered into a hire purchase agreement on 14 August 2000 with the defendant to hire a vehicle. The defendant was a firm and Rozida bte Zainal and Aminah bte Abd Ramhan ('Aminah') were the partners in the defendant at the material time.

D

The defendant failed to meet their instalment payments and consequently, the plaintiff terminated the hire purchase agreement and demanded for the repayment of the outstanding amounts. The plaintiff then commenced legal proceedings against the defendant and obtained judgment in default against them.

E

Aminah applied to set aside the judgment in default but the application was dismissed by the sessions court. This was the defendant's appeal. One of the arguments raised was that the hire purchase agreement was not binding on Aminah was she was not a signatory to the agreement.

F

Held, dismissing the appeal:

(1) A partner was an agent of the firm within the scope of his authority and a partnership had no separate legal entity from its individual partners. As such, a suit against a partnership was a suit against all the partners, as though the partners were individually named in the suit (see para 24).

G

(2) The judgment obtained in this case was a regular judgment by reason of the cause papers having been served pursuant to the contractual provision (see para 25).

(3) As Aminah was one of the partners in the defendant firm at the time of
H execution of the hire purchase agreement and at the time when this action was filed, she was jointly and severally liable for the judgment debt (see para 25).

I

[**Bahasa Malaysia summary**

Plaintif telah memasuki satu perjanjian sewa beli pada 14 Ogos 2000 dengan defendan untuk sewaan sebuah kenderaan. Defendan merupakan satu firma

dan Rozida bte Zainal dan Aminah bte Abd Ramhan ('Aminah') adalah rakan kongsi defendan pada masa material.

Defendan gagal untuk menjelaskan pembayaran ansuran dan oleh itu plaintif telah menamatkan perjanjian sewa beli itu lalu menuntut untuk mendapatkan pembayaran balik jumlah tertunggak. Plaintif seterusnya memulakan prosiding undang-undang terhadap defendan dan telah mendapat penghakiman ingkar terhadap defendan.

Aminah memohon untuk mengetepikan penghakiman ingkar tetapi permohonan itu telah ditolak oleh mahkamah sesyen. Ini adalah rayuan defendan. Satu daripada hujahan yang dikemukakan adalah bahawa perjanjian sewa beli itu tidak mengikat ke atas Aminah sekiranya dia bukan penandatangan kepada perjanjian itu.

Diputuskan, menolak rayuan itu:

(1) Seorang rakan kongsi yang merupakan ejen kepada firma dalam lingkungan autoritinya dan dalam satu perkongsian tidak mempunyai entiti undang-undang yang berbeza dan berasingan daripada rakan kongsi individu. Oleh itu, satu guaman terhadap perkongsian adalah guaman terdapat semua rakan kongsi seakan setiap rakan kongsi dinamakan di dalam guaman itu secara individual (lihat perenggan 24).

(2) Keputusan penghakiman dalam kes ini merupakan penghakiman yang mengikut aturan kerana kertas-kertas kausa yang telah diserahkan adalah menurut peruntukkan perjanjian (lihat perenggan 25).

(3) Oleh kerana Aminah merupakan seorang daripada rakan kongsi dalam firma defendan pada masa perjanjian sewa beli ditandatangani dan pada masa tindakan ini difailkan, beliau bertanggungjawab secara bersesama dan berasingan untuk hutang penghakiman (lihat perenggan 25).]

Notes

For a case on breach of contract with partnership, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) para 1002.
For cases on debt, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 933–936.

Legislation referred to

Partnership Act 1961 ss 7, 8, 11
Subordinate Court Rules 1980 O 10 r 6
Appeal from: Summons No 4 52 47 of 2001 (Sessions Court, Shah Alam)

AT P'ng (Hariati Hashim with her) (Ravi, Beltran & Co) for the appellant.
T Jeyadeva (PH Ong with him) (Radakrishnan) for the respondent.

Zaleha Zahari J:

[1] This is an appeal against the decision of learned sessions court judge dated 22 February 2002 dismissing the appellant's application to set aside and stay of the judgment in default entered against the appellant on 22 February 2001.

[2] According to the statement of claim dated 8 January 2001 the plaintiff, as owner, had on 14 August 2000, entered into a hire and purchase agreement with the appellant ('the HP Agreement') to hire, with the option to purchase, a vehicle, one Suzuki Futura MLE registration No BFW 8246 ('the said vehicle') for use of the appellant. According to the HP Agreement the appellant agreed to pay a deposit of RM7,407.39 and the balance of RM39,543.75 in 59 monthly installments of RM660 with effect from 14 September 2000 and a final payment of RM603.75.

[3] By guarantee agreement, also dated 14 August 2001, the second defendant guaranteed to pay the respondent all sums payable by the appellant.

[4] It was the respondent's contention that, upon the appellant's failure to meet their instalment payment, the respondent had through their solicitors, vide letter dated 29 November 2000, considered the HP agreement terminated and demanded a sum of RM29.2935 being the amount outstanding as at 25January 2000, including interest and costs as damages.

[5] Thereafter, upon the appellant's failure to pay the sum outstanding and upon failure to surrender the said vehicle back to the respondent, on 9 January 2001, the respondent instituted Shah Alam Sessions Court Summons No 4–52–47 of 2001 against the appellant as well as the guarantor, Razani Mohd Yusof.

[6] According to the affidavit of service of Thinagaran a/l Rajagopal affirmed on 8 Febraury 2001 (pp 1–2 supplementary appeal record) the summons and statement of claim was served on the appellant by way of registered post at the following address ie 'No 48, Taman Setia Rawang, Jalan Ipoh, 48000 Rawang, Selangor, on 30 January 2001.' As for service of the summons and statement of claim on the second defendant, it was sent by way of registered post at 'No 22, Jalan Tulip 1B/1, Seksyen Sentosa Rawang, 48300 Selangor Darul Ehsan'. The return date of the summons was 22 February 2001. The court took note of the fact that the respondent's solicitor, vide letter dated 29 January 2001 accompanying the said summons, gave notice to the appellant and the second defendant that if they failed to attend court on the mention date of 22 February 2001, judgement in default may be entered against them/him.

[7] By reason of the appellant and Razani Mohd Yusof being absent on 22February 2001 the learned sessions court judge recorded a judgement in default against the appellant and the second defendant.

[8] According to the search conducted by the respondent the partnership of the appellant's firm was first registered on 12 October 1998. The details of the persons listed as partners were as follows:

(1) Rozida bte Zainal was a principal partner effective from 1 March 2000 and as at 13 February 2001 continued to be a partner;

(2) Aminah bte Abd Rahman was a principal partner effective from 12 June 1998 and continued to be a partner as of 13 February 2001;

(3) Muhammed bin Ramli was a partner effective 12 June 1998 but had withdrawn from the said partnership with effect 15 July 1999.

(pp 40–41 supplementary appeal record).

[9] Thereafter, on 25 May 2001 upon the continued failure of the appellant and the second defendant to pay the judgement sum, the respondent filed an application for leave to execute the default judgment dated 22 February 2001 against Rozida bte Zainal (No K/P 69082001–71–5288) and against Aminah bte Abd Rahman (No K/P 451226–71–5192), the partners of the Appellant, pursuant to O 10 r 6 of the Subordinate Court Rules 1980, which application was fixed for hearing on 27 July 2001.

[10] According to the affidavit of Ong Peng Hoe affirmed on 22 May 2001 filed in support of this application (pp 32–33 supplementary appeal record) a sealed copy of the judgement in default had been served on both the appellant as well as the second defendant on 25 April 2001 and that the appellant and the second defendant has not effected payment of the sum stipulated in the said judgment. The respondent solicitor's letter dated 25 April 2001 accompanying the said application also gave notice that, if the appellant and the second defendant failed to pay the judgment sum within seven days thereof, their instructions were to institute execution proceedings against them.

[11] According to the affidavit of Thinagaran a/l Rajagopal affirmed on 16July 2001 (pp 22–29 of the supplementary appeal record) the application of 2nd Defendant for leave to execute the Judgement in default was served on the appellant on 30 June 2001 and the partners of the appellant's firm by way of registered post on 29 June 2001 to the address specified in the HP Agreement, ie:

(a) to the appellant at No 58, Taman Setia Rawang, Selangor Darul Ehsan;

(b) to the second Defendant at No 22, Jalan Tulip 1B/1 Seksyen BS 2, Bukit Sentosa, 48300 Rawang; and

(c) to the partners of the appellant, Rozida bte Zainal at PT151, Jalan Pasar Besar, 17200 Rantau Panjang Kelantan Darul Nairn and Aminah Bte Abd Rahman, 1 Jalan Rekod, Taman Sri Reko, 43000 Kajang, Darul Ehsan.

[12] On 27 July 2001 the respondent obtained an order to execute the said default judgment against the partners of the appellant pursuant to O 10 r 6 Subordinate Court Rules 1980.

[13] Thereafter, one of the partners, Aminah bte Abd Rahman ('Aminah'), vide application filed on 18 September 2001, applied to set aside the judgment in default recorded against the appellant, which application was dismissed by the sessions court judge and which is the subject matter of this appeal.

The Appellant Counsel's Submissions

[14] The appellant's counsel initially proceeded to argue this appeal on the premise that the judgment in default recorded againts the appellant was a 'regular' judgment and that he would be presenting his arguments on the basis of the appellant having a defence on its merits. Be that as it may, at the adjourned hearing date of 1 October 2004, the appellant's counsel changed his stand and informed the court that he would also be contending that the judgment which the appellant was seeking to set aside was an 'irregular' judgment.

[15] The appellant's counsel submitted that the HP Agreement upon which the respondent's case rests was not binding on Aminah as Aminah was not a signatory to the said agreement.

[16] He further submitted that the service of the summons and statement of claim on the appellant was irregular by reason of the fact that it was served by way of 'registered post' on the appellant at its business address and not on the partners of the appellant personally.

[17] He contended that an 'imposter' had signed the HP Agreement and that the appellant was accordingly not bound by the HP Agreement. According to the him as there was no evidence before the court as to which partner of the appellant's firm had signed the HP Agreement, and by reason of Aminah's denial of having signed the same, there was accordingly an issue to be tried.

[18] He accordingly urged the court to allow the appeal with costs.

The Respondent Counsel's Submissions

[19] In his reply the respondent's counsel drew the court's attention to p 45 of the appeal record, where the partners of Restoran Rizqin were listed ie Rozlda Zainal (who is the wife of Aminah's son, the other initial partner, Thairen bin Ramli) and that Aminah remained a partner of the said business. In the light of this background there is an admission that the business of the appellant was a 'family run' business.

[20] As to the contention that the HP Agreement entered into was without Aminah's knowledge, he drew the court's attention to s 8 of Partnership Act.

[21] The appellant counsel submitted that on the facts of this case the judgment obtained was a 'regular' judgment, that service of the documents was good as it had been effected in accordance with a contractual provision ie, cl 22 of the HP Agreement, which reads as follows:

22 The Hirer agrees that any notice or other documents including a summons or writ of summons and statement of claim any documents or papers connected therewith in respect of any action in connection with or under this HP Agreement shall be validly served on the Hirer if served on the Hirer personally or sent to the Hirer by prepaid registered or ordinary post to or left at the Hirer's address stated above or to or at the Hirer's current business or current or that last address known to the Owner and if sent by ordinary post shall be conclusively deemed to have been received by the Hirer after the expiry of forty eight (48) hours after the time of posting.

[22] The respondent counsel's submission that there was accordingly no issue to be tried. The debt in this case was clearly that of the firm and that every partner is accordingly liable. He accordingly urged this court to dismiss this appeal with costs.

FINDINGS

[23] In the consideration of this appeal the court took into consideration ss7, 8 and 11 of the Partnership Act 1961 which reads as follows;

> 7 Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular manner, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner.
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> 8 An act or instrument to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all partners;
>
> Provided that this section shall not affect the general rule of law relating to the execution of deeds or negotiable inmstruments.
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> 11 Every partner is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner and after his death his estate is also severally liable in a due course administration for such debts and obligations, so far as they remain unsatisfied but subject to the prior payment of his separate debts.

[24] Thus, a partner is an agent of the firm within the scope of his authority and that a partnership has no separate identity from its individual partners. Asuit against a partnership is a suit against all partners, as though all the partners were individually named in the suit.

[25] On the facts of this case I am in agreement with the respondent's counsel submission that the judgment obtained in this case was a regular judgment by reason of the cause papers having been served pursuant to a contractual provision. I am also in agreement with the submission that as Aminah was one of the partners in the register of business of the appellant's firm at the time of execution

of the Hire Purchase Agreement, and continues to be on the register when this action was filed, Aminah is according jointly and severally liable for the judgement debt. On the facts of this case I accordingly hold that they was no issue to be tried.

[26] The appeal was accordingly dismissed with costs and the decision of the session's court dated 22 February 2002 is affirmed.

Appeal dismissed with cost.

Reported by Lim Lee Na